IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 699 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.R.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

YUSUF TAJA MORIYA MUMAN & Anr.

Appearance:

1. Criminal Appeal No. 699 of 1998
MR BD DESAI, ADDL.PUBLIC PROSECUTOR for appellant
NOTICE SERVED for Respondents

CORAM : HON'BLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE MR.JUSTICE M.R.SHAH

Date of decision: 16/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 378 of the Code of Criminal Procedure, 1973, is directed against judgment dated April 29, 1998, rendered by the learned 2nd Extra Assistant & Additional Sessions Judge, Palanpur, in Special Case No.1 of 1996, by which the respondents are acquitted of the offences punishable under Sections 17 & 18 or 17 & 18 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the Act" for short).

2. Mr.P.J.Chaudhary, who was then P.S.I., L.C.B., Banaskantha at Palanpur, had received an information on November 12, 1995 that a person was selling narcotic drugs, such as opium, ganja, charas, heroin etc. between 14.00 Hrs.and 15.00 Hrs. at cross-roads on Palanpur Highway. The information so received by him was conveyed to D.S.P. by a report. The D.S.P. had directed Mr.Chaudhary to include P.S.I. Mr.K.K.Desai in raiding party. Mr.Chaudhary had constituted a raiding party and asked head constable Meghrajbhai to summon two persons who were inclined to act as panch witnesses. Accordingly, head constable Meghrajbhai had summoned Kamlesh Shyamsunder Sindhi and Prakash Mafatlal Padhiyar. As these two persons had shown inclination to act as panch witnesses, P.S.I. Mr.Chaudhary had informed them about the information received by him. The members of raiding party had searched persons of each of them, but nothing incriminating was found from any one. Thereafter first part of the panchnama was prepared and the raiding party had proceeded to the spot in two Government jeeps. At about 16.40 hours, Mr.Chaudhary had spotted a rickshaw bearing registration No.GJ-8T-535 coming from Deesa road. As soon as the rickshaw had stopped at a distance of 8 to 10 ft. from the place where Mr.Chaudhary and others had maintained watch, one person had alighted from the rickshaw and started running towards gali of Palan Garage. Those, who were constituting raiding party, had chased him, but the said person could not be apprehended. Head Constable Abbaskhan and police constable Becharbhai, who were also members of the raiding party, had identified the person who had run towards gali of Palan Garage as Muman Yusuf Taja i.e. respondent No.1. The case of the prosecution is that while running away from the rickshaw, respondent No.1 had thrown on ground a small bundle which on verification was found to be containing a small plastic bag. The plastic bag was found to be containing ash coloured substance. On smelling, the substance was identified as opium. Head Constable Mohmed Hanif was asked to summon a person to

weigh the substance found and accordingly, Head Constable Mohmed Hanif had summoned Dashrathbhai K.Khatri, who had come to the spot with scales for weighing the substance found. The weight of the substance found was 100 grams. Thereafter two samples, each of 20 grams, were drawn and sealed. After completing second part of panchnama, P.S.I. Mr.Chaudhary had lodged complaint with P.S.O. Palanpur City Police Station. P.S.O. of Palanpur City Police Station had handed over investigation of the complaint lodged by Mr.Chaudhary to Mr.Chaudhary himself. Mr.Chaudhary had recorded statements of persons who were found conversant with the facts of the case and arrested respondent No.1 on November 13, 1995 at 22.15 hours. On interrogation, it was learnt by Mr.Chaudhary that respondent No.2 had supplied the opium to respondent No.1. Therefore, Mr.Chaudhary and others had raided house of respondent No.2 and it is the case of prosecution that 470 grams opium was found from the house belonging to respondent No.2. One of the samples drawn from the substance which was found lying on the ground, was sent to Forensic Science Laboratory for analysis, and report of analyst was obtained. The report indicated that the substance analysed was opium within the meaning of provisions of the Act. On conclusion of investigation, the respondents were chargesheeted in the Court of learned Special Judge, Banaskantha at Palanpur. The chargesheet was received by the Court and registered as Special Case No.1 of 1996.

3. The learned Judge had framed charge against the respondents of the offences punishable under Sections 17 & 18 or 17 & 18 read with Section 29 of the Act. The charge was read over and explained to the respondents, who had pleaded not guilty to the same and claimed to be tried. The prosecution had, therefore, examined (1) Prakashkumar Mafatlal Padhiar, PW.1 at Exh.14, (2) Mansukhlal Babulal, PW.2 at Exh.15, (3) Kanjibhai Velabhai Chaudhary, PW.3 at Exh.19, (4) Atul Sashikant Shah, PW.4 at Exh.21, (5) Karamshibhai Kurshibhai Desai, PW.5 at Exh.22, (6) Abbaskhan Thakermiya, PW.6 at Exh.25, (7) Dasharathlal Kalidas Khatri, PW.7 at Exh.29, (8) Kamlesh Shyamlal Sindhi, PW.8 at Eh.32, (9) Mr.P.J.Chaudhary, PSI, PW.9 at Exh.34, (10) Ganpatlal Khemshanker Joshi, PW.10 at Exh.45, (11) Jashvantsing Velaji, PW.11 at Exh.49, (12) Samaratdan Bhavanidan Gadhvi, PW.12 at Exh.52, (13) Nardan Dhiraji, PW.13 at Exh.53, (14) Pravinchandra Harilal Parmar, PW.14 at Exh.54, and (15) Dy.S.P. Shri Ishwarbhai Dahyabhai Mayavanshi, PW.15 at Exh.63, to prove its case against the respondents. The prosecution had also produced documentary evidence, such as panchnama at Exh.23, report

submitted by Mr.Chaudhary to P.S.O. at Exh.37, complaint of Mr.Chaudhary at Exh.38, report made by Mr.Chaudhary to his immediate superior official at Exh.39, report to higher officer by P.S.I. Mr.Chaudhary regarding recovery of 100 grams of opium during the raid at Exh.41, report of weight issued by Dasharathbhai K. Khatri at Exh.30, F.S.L.report at Exh.43 etc.,in support of its case against the respondents.

4. After recording of evidence of prosecution witnesses was over, the learned Judge had explained to the respondents the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by Section 313 of the Code of Criminal Procedure, 1973. In their further statements, the case of the respondents was that a false case was foisted upon them by P.S.I. Mr.Chaudhary. According to respondent No.1, he was a businessman dealing in buffaloes and as a dispute regarding amount to be paid by him to one of the relatives of P.S.I. Mr.Chaudhary regarding sale of buffalo was going on, P.S.I. Mr.Chaudhary had illegally arrested him on November 7, 1995 and as he had refused to make payment as demanded by P.S.I.Mr.Chaudhary, a false case was registered against him. In order to substantiate his case, respondent No.1 had examined himself at Exh.68 and also two witnesses, namely, Mohmed Rasulbhai Memon, D.W.2 at Exh.69 and Mohmed Rafiq Ahmedmiya Shaikh, D.W.3 at Exh.70.

5. On appreciation of evidence adduced by the parties, and after hearing their learned counsels, the trial Court held that it was not proved by the prosecution that respondent No.1 had thrown on the ground a small bundle containing 100 grams of opium and run away on the date of the incident. The learned Judge deduced that it was not proved by the prosecution beyond reasonable doubt that respondent No.2 had sold opium to respondent No.1, which was ultimately found lying on the ground. In view of the abovereferredto conclusions, the learned Judge has acquitted the respondents by judgment dated April 29, 1998, giving rise to instant appeal.

6. Mr.B.D.Desai, learned Additional Public Prosecutor, contended that reliable and trustworthy evidence of police officials establishes that on the date of incident, respondent No.1 had alighted from rickshaw and on seeing the police officers, had run away from the spot after throwing a small bundle containing opium which was in his possession and, therefore, respondent No.1 ought to have been convicted of the offences with which

he was charged. What was maintained was that the evidence of P.S.I. Mr.Chaudhary stands corroborated by the evidence of other police officers as well as contemporary documentary evidence on record and, therefore, the appeal should be accepted. According to the learned A.P.P., the reasons assigned by the learned Judge for acquitting the respondents are contrary to the evidence on record and, therefore, the judgment impugned in the appeal should be reversed. It was argued that the case against respondent No.2 was also proved by the prosecution and, therefore, both the respondents ought to have been convicted of the offences punishable under Sections 17 & 18 or Sections 17 & 18 read with Section 29 of the Code. The learned counsel of the State Government emphasised that evidence on record has not been appreciated in its correct perspective by the learned Judge of the trial Court and, therefore, appeal should be accepted.

7. Though the respondents are duly served, they have neither appeared in person nor through their lawyer.

8. This Court has undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. From the record of the case, it is evident that P.S.I. Mr.Chaudhary had received information that a person was selling narcotic drugs regularly between specific time at cross-roads on Palanpur Highway and, therefore, had constituted a raiding party. There is no manner of doubt that P.S.I. Mr.Chaudhary had played a vital and leading role while carrying out raid. However, the evidence of P.S.I. Mr.Chaudhary read with that of P.S.O. Palanpur City Police Station would indicate that P.S.O. of Palanpur City Police Station had handed over investigation of complaint lodged by Mr.Chaudhary to Mr.Chaudhary himself. One of the important circumstances, which is properly taken into account by the trial Court, is that Mr.Chaudhary, who was leader of the raiding party, had himself investigated the complaint lodged by him. As Mr.Chaudhary himself had investigated his own complaint, note of caution sounded by the Supreme Court while dealing with cases wherein investigation is made by police officer who was one of the members of raiding party in (i) Bhagwan Singh v. State of Rajasthan, A.I.R.1976 S.C. 985, and (ii) Megha Singh v. State of Haryana, A.I.R.1995 S.C. 2239, will have to be borne in mind. It is difficult to understand in what circumstances P.S.I. Mr.Chaudhary had undertaken investigation of his own complaint. Normally, a police

officer who is one of the members of the raiding party, should not investigate the complaint so as to ensure fair and impartial investigation. Here, in this case, Mr.Chaudhary had not only arranged the raid, but recovered the substance allegedly thrown on the ground and also searched houses of the respondents. This is a vital infirmity in prosecution case, which is bound to reflect on the credibility of its case. In Megha Singh (supra), the Supreme Court has made following pertinent observations while deprecating investigation by a police officer who had carried out search :-

> "We have also noted another disturbing feature in this case. PW.3, Siri Chand, Head Constable arrested the accused and on search being conducted by him, a pistol and the cartridges were recovered from the accused. It was on his complainant a formal first information report was lodged and the case was initiated. He being complainant should not have proceeded with the investigation of the case. But, it appears to us that he was not only the complainant in the case, but he carried on with the investigation and examined witnesses under Section 161 Cr.P.C. Such practice, to say the least, should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation."

Applying the principles laid down by the Supreme Court to the facts of the present case, this Court finds that P.S.I. Mr.Chaudhary was not justified in investigating the complaint lodged by him, more particularly when he himself had arranged the raid. Therefore, the defence of the respondents that the whole case was concocted against them will have to be viewed in the light of this glaring infirmity in the prosecution case.

9. It is the case of the prosecution that the person who had thrown a small bundle containing opium and run away towards gali of Palan Garage, was respondent No.1 and that he was identified by police head constable Abbaskhan Thakermiya and police constable Becharbhai Meghabhai. It is relevant to notice that police constable Becharbhai Meghabhai is not examined by the prosecution as one of the witnesses in instant case. It was claimed by witness Abbaskhan Thakermiya that he was able to identify respondent No.1 as the person who had alighted from the rickshaw and thrown small bundle containing opium on the ground because he had occasion to see respondent No.1 with reference to dispute between him

and his brother relating to `Gharthal plots', which had taken place prior to 1 1/2 or 2 years of the date of incident, when he was serving at Taluka Police Station. However, this witness has, in terms, admitted that he had not identified as to whether respondent No.1 was complainant or accused in that case nor had he ascertained as to whether respondent No.1 was complainant or cited as one of the witnesses. This witness was not able to give C.R. Number which was registered at Taluka Police Station either against respondent No.1 or by respondent No.1. It was admitted by him that village Khemana falls within the jurisdiction of Palanpur Police Station and that he was able to identify some of the persons against whom cases were registered at Palanpur Police Station and not all. It was also admitted by him that he was not able to identify all the persons of village Chadotar to which respondent No.1 belongs. The evidence on record would indicate that the person who had alighted from the rickshaw had disappeared in thin air within no time, but admittedly, no identification parade was held after the incident. It is relevant to notice that the so-called incident of recovery of opium after it was thrown on ground by person who had alighted from rickshaw had taken place on November 12, 1995 and as per the say of constable Abbaskhan, he was able to identify respondent No.1 as the person who had alighted from rickshaw and run away because two years prior to the date of incident he had an occasion to see the respondent no.1 at Taluka Police Station, whereas his testimony before the Court was recorded on August 14, 1997. It is highly doubtful that Abbaskhan, who according to his own say, had an occasion to meet respondent No.1 in 1993, would identify respondent No.1 for the first time in court-room in the year 1997 as the person who had alighted from the rickshaw and thrown small bundle containing opium on the ground. Thus, identification of respondent No.1 as the person who had alighted from the rickshaw and thrown small bundle containing offending substance, is not proved by the prosecution. The learned Special Judge, who had advantage of observing demeanour of witnesses, has disbelieved the testimony of Abbaskhan as full of inconsistencies and not reliable. Though it was claimed by the prosecution that respondent No.1 was identified by two persons, namely, by Abbaskhan Thakermiya and Becharbhai Meghabhai, Becharbhai Meghabhai was never examined and another police officer, namely, Karamshibhai K.Desai was examined to establish that respondent No.1 was the person who had alighted from the rickshaw and run away towards Palan Garage. To say the least, evidence of witness Karamshibhai K.Desai regarding identification of respondent No.1 does not inspire confidence at all. If

he had been able to identify respondent No.1, Abbaskhan would not have omitted to refer this fact in his testimony. At this stage, it would be relevant to refer to evidence adduced by defence witnesses. The claim of respondent No.1 is that he was physically detained on November 7, 1995 when he was going home from a Theatre because of dispute between him and one of the relatives of P.S.I. Mr.Chaudhary relating to sale of buffaloes. His evidence would indicate that he had purchased buffaloes from one of the relatives of P.S.I. Mr.Chaudhary and he had to pay Rs.22,000/- to the said person, but as the said amount could not be paid, a false case was registered against him after illegally confining him from November 7, 1995 to November 13, 1995. His evidence would show that during the time of his illegal confinement, head constable Abbaskhan had made arrangement for tiffin and he was summoned at P.T.F. Office on November 13, 1995 and arrested thereafter. Though an accused person is a competent witness, normally, Court does not find that an accused person tenders evidence on oath in his defence. But, here respondent No.1 has tendered evidence on oath in support of his defence. Respondent No.1 was cross-examined by learned A.P.P., but nothing substantial could be elicited so as to doubt the version of respondent No.1 that he was illegally detained by P.S.I. Mr.Chaudhary from November 7, 1995 to November 13, 1995. What is shocking is that P.S.I. Mr.Chaudhary could not produce on record the arrest memo of respondent No.1. P.S.I. Mr.Chaudhary had not maintained any record to substantiate his case that respondent No.1 was arrested on November 13, 1995. Non-preparation of arrest panchnama is contrary to the provisions of Section 52 of the Act, which is enacted for laudable purpose. The evidence tendered by respondent No.1 gets full corroboration from evidence of other two defence witnesses whose evidence is also natural and inspires confidence of the Court. The evidence on record further shows that head constable Abbaskhan and P.S.I. Mr.Chaudhary had lodged a false case under N.D.P.S.Act against one Sumer Singh Rajpurohit, who is a practising lawyer at Pali (Rajasthan) and in respect of whom report under Section 169 Cr.P.C. was submitted which was ultimately accepted by the Court. Thus, P.S.I. Mr.Chaudhary and head constable Abbaskhan have tendency to implicate innocent persons falsely in a case arising under the Act to suit their own purpose.

10. The case of the prosecution that the substance found was weighing 100 grams is also doubtful. Mr.Khatri, who according to the prosecution, had weighed the offending substance and who is examined as one of the

prosecution witnesses, has not supported the prosecution case that he had weighed the substance found and that weight of substance found was 100 grams. Though Mr.Khatri has stated that he had issued certificate indicating weighment of substance, he has categorically stated that scales were taken by police constable from him, who had returned the same after an hour. The certificate issued by Mr.Khatri shows that weight of substance found was 470 grams. It is relevant to notice that respondent No.1 had filed bail application and Court had issued notice to the investigating officer. One of the grounds pleaded in the bail application was that there was discrepancy about weight of substance found as claimed by police officers and as mentioned in the certificate of Mr.Khatri. The bail application was rejected on December 15, 1995, as investigation was going on. However, in order to remove this inconsistency, P.S.I. Mr.Chaudhary had recorded second police statement of Mr.Khatri on December 17, 1995 and sought his clarification that mention of 470 grams of opium in his certificate dated November 12, 1995 was a mistake on his part, but weight of substance was 100 grams. This is quite evident from the admission made by Mr.Chaudhary himself during cross-examination by the learned counsel of respondent No.1. This is simply shocking. In order to remove glaring inconsistencies, Mr.Chaudhary, who was investigating his own complaint, had gone to the extent of recording a statement of a witness after more than a month and that too after rejection of bail application where inconsistencies in weight were pointed out to the Court. It is relevant to notice that witness Dasharathbhai Khatri has categorically stated that his second statement was never recorded by Mr.Chaudhary. Thus, the possibility that P.S.I. Mr.Chaudhary had concocted the statement of witness Dasharathbhai Khatri does not stand ruled out. The glaring discrepancy regarding weight of the substance found does not stand satisfactorily explained and this also throws doubt on prosecution case.

11. Further, sample was not properly sealed at all. The evidence of prosecution witnesses would indicate that two samples, each of 20 grams, were drawn and the substance was placed in a plastic bag mouth of which was tied with a twine and slip bearing signatures of panch witnesses was placed thereon and thereafter the whole plastic bag was tied with a twine. The plastic bag was thereafter placed in a cloth bag, mouth of which was stitched and thereafter seals were applied. It is relevant to notice that seals were always available to the police officers at the Police Station. No seal was

applied at the place where slip containing signatures of panch witnesses was pasted. If that had been done so, it would have ruled out the possibility of tampering the substance. However, fool proof procedure for sealing of sample was never resorted to. Under the circumstances, possibility of tampering with and/or substitution of substance found is not ruled out and, therefore, respondent No.1 would be entitled to the benefit of reasonable doubt.

12. So far as respondent No.2 is concerned, except confessional statement of respondent No.1, which was secured by P.S.I. Mr.Chaudhary while respondent No.1 was in his custody, no evidence worth the name was adduced to indicate that respondent No.2 had sold opium to respondent No.1. Therefore, acquittal of respondent No.2 can hardly be regarded as illegal or erroneous.

13. This is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had opportunity to observe demeanour of the witnesses. As this Court is in general agreement with the view expressed by the learned Judge, the Court does not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the learned Judge and this Court is of the opinion that expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi & ors. v. Bijendra Narain Chaudhar, A.I.R. 1967 S.C. 1124, and (2) State of Karnataka v. Hema Reddy and another, A.I.R. 1981 S.C. 1417. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondent. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents. The learned Additional Public Prosecutor has failed to convince this Court to take a view contrary to the one already taken by the learned Judge and, therefore, the appeal is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. Muddamal to be disposed of in terms of directions given by the learned Judge in the judgment

impugned in the appeal.

(J.M.Panchal,J.)

(M.R.Shah, J.)

(patel)*